FILE COPY

Office Supreme Court, U.S.
FILED
APR 10 1970
JOHN F. DAVIS, CLERK

No. ~~1309~~ 109

In the

Supreme Court of the United States

OCTOBER TERM, A.D. 1969

TIME, INC.,

Petitioner,

vs.

FRANK PAPE,

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

PATRICK W. DUNNE
ROBERT J. NOLAN
EDWARD J. HLADIS
NOLAN, O'MALLEY & DUNNE
33 North Dearborn Street
Chicago, Illinois 60602
Attorneys for Respondent

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
Reasons for Granting the Writ	14
Conclusion	32

CITATIONS

CASES

Ashton v. Commonwealth (1965) 405 S.W. 2d 562	29
Curtis Publishing Co. v. Butts (1967) 388 U.S. 130, 18 L. ed 2d 1094, 87 S. Ct. 1975	21, 24
Garrison v. Louisiana, 379 U.S. 64	24
Gilligan v. King (1965) 48 Misc. 2d 212, 264, N.Y.S. 2d 309	30
Goldwater v. Ginsberg, 414 F. 2d 324	16, 25
Gunning v. Cooley (1930) 281 U.S. 90, 50 S. Ct. 231	24
Hamilton Shoe Co. v. Wolf, 240 U.S. 251	30
Henry v. Collins, 380 U.S. 356	24
Hogan v. New York Times Co. (1963 C.A. 2 N.Y.), 313 F. 2d 354	29
Mahnke v. Northwest Publications, Inc. (1968) 280 Minn. 328, 160 N.W. 2d 1	30
New York Times Co. v. Connor, 365 F. 2d 567	29

PAGE

New York Times Co. v. Sullivan (1964) 376 U.S. 254, 11 L. ed 2d 686, 84 S. Ct. 710, 95 A.L.R. 2d 1412 .... 6, 7, 14, 15, 16, 17, 19, 20, 25

Pape v. Time Inc., (1963 C.A. 7 Ill.), 318 F. 2d 652 6

Pape v. Time, Inc., (1965 C.A. 7 Ill.), 354 F. 2d 558 7

Pape v. Time, Inc., 419 Fed. 2nd 980 .... 1, 11

Ragano v. Time, Inc., 302 F. Supp. 1005 (1969) 29

Spahn v. Julian Messner, Inc., (1967) 21 N.Y. 2d 124, 233 N.E. 2d 840 24

St. Amant v. Thompson, (1968) 390 U.S. 727, 20 L. ed 2d 262, 88 S. Ct. 1323 .... 14, 21, 23, 24

Tucker v. Kilgore, (1965) 388 S.W. 2d 112 30

Vanish v. Best Medium Publishing Co., (1968 C.A. 2 N.Y.), 405 F. 2d 608 27

TEXT

Supreme Court Practice, Stern-Gressman, Third Edition, 1962, Section 4-19 30

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D. 1969

No. 1309

TIME, INC.,

Petitioner.

vs.

FRANK PAPE,

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The Petition correctly sets forth the citations of the various opinions below except that it fails to note that certiorari was denied the second opinion of the Seventh Circuit by the Supreme Court, in 384 U.S. 909. The third opinion of the Seventh Circuit, the review of which is now sought, is reported in *Pape* v. *Time, Inc.*, 419 F.2d 980.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

The question presented is whether, in a libel action, on a motion for directed verdict, there was any evidence upon which a jury could properly find the defendant, Time, Inc., in publishing its falsehood, guilty of malice; that is, knowledge of falsity or reckless disregard of whether its story was true or false.

Statement of the Case

This is an action for libel brought by the plaintiff, Frank Pape, a Chicago police officer, against the defendant, Time, Inc., growing out of a story appearing in the magazine of the defendant dated November 24, 1961.

On November 24, 1961, Frank Pape was employed as Director of Security for the Chicago Thoroughbred Enterprises, Inc., which operates Arlington Park, Washington Park and Balmoral Jockey Club, in and about the City of Chicago, State of Illinois. On said date he was on leave of absence from his position as Captain of Police with the Chicago Police Department. Capt. Pape had become a police officer in March 1933, and continued in that employment until April 15, 1961, when he was employed on a full time basis by the above named race tracks. Plaintiff was a patrolman from 1933 to 1942. In 1942 he was promoted to sergeant and in 1952 he was promoted to lieutenant. He attained the rank of captain in 1959. During the period Frank Pape was a sergeant he participated in hundreds of arrests (App. 213). Plaintiff was appointed to the position of Deputy Chief of

Detectives in 1957, which position he held on October 17, 1958.

On November 17, 1961 the Annual Report of the United States Commission on Civil Rights was issued and published (App. 266). The chapter of the Commission's Report relevant hereto begins with the statement:

> "In the text of this chapter the Commission briefly describes the alleged facts in eleven typical cases of police brutality."

The Report went on to caution:

> "In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements."

The Commission's Report went on to recite eleven incidents. Insofar as ten of these incidents were concerned the Commission identified the persons involved only by initials. The remaining incident reported by the Commission concerned the plaintiff, Frank Pape, and appeared on pages 20 and 21 of its Report, as follows:

> "Search, Seizure and Violence: Chicago, 1958—The Supreme Court of the United States decided the case of *Monroe* v. *Pape* on February 20, 1961. Although its decision did not finally dispose of the case, it did permit the plaintiff to sue several Chicago police officers for violation of the Federal Civil Rights Act on the basis of a complaint which alleged that:
>
> > '. . . On October 29, 1958, at 5:45 A.M., thirteen Chicago police officers, led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the

living room; that the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him "nigger" and "black boy"; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on "open" charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family or an attorney; that he was subsequently released without criminal charges having been filed against him."

On November 24, 1961 Time, Inc. published its magazine with nation-wide circulation of 2,700,000 and circulation in and about the City of Chicago of 53,000, and in the State of Illinois of 155,000 (App. 43 and 51). It contained the following article:

"Dawdling on the Corner

"The new paperback book has 307 pages and the simple title *Justice*. It is the last of five volumes in the second report of the U. S. Commission on Civil Rights, first created by Congress in 1957. *Justice* carries a chilling text about police brutality in both the South and the North—and it stands as a grave indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the Commission.

"The bluntly frank report tells of a police officer, referred to only as 'Y', in Dawson, Georgia, who arrested Negro James Brazier for speeding in November 1957. It quotes James Brazier: 'when I first entered the door of the jail, "Y" hit me on the back of the head and knocked me down and said, 'you smart son-of-a-bitch, I been wanting to get my hands on you for a long time.' I said, 'why you want me for?' 'Y' said, "you is a nigger who is buying new cars and we can't hardly live. I'll get you yet.'" When Brazier was arrested again five months later by the same officer, Brazier's wife related: '"Y" then said, 'I told you I would get you.' James said, 'what do you want to hurt me for? I ain't done nothing. I got a heap of little children.' 'Y' said, "I don't give a goddam how many children you got, you're going away from here." 'Y' pulled out his pistol and struck it against James' stomach.'

"Beaten to Death." Continues the report: "Brazier's ten-year old son pleaded with the officers to stop beating his father and was knocked to the ground by 'Y'; the victim was thrown onto the floor of the police car with his legs dangling outside. 'Y' kicked him twice in the groin, slammed the car doors on his legs, threw a hat full of sand into his bloody face, and drove off." Brazier died five days later and 'Y' was never punished.

"Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 A. M. by thirteen police officers, ostensibly investigating a murder. The police, says *Justice*, "broke through two doors, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and 'stand naked in the center of the living room. Detective Frank Pape struck Mr. Monroe several times with his flashlight, calling him 'nigger' and 'black boy.' Another officer pushed Mrs. Monroe.

> Other officers hit and kicked several of the children and pushed them to the floor. The police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers." The officers were not punished; although Monroe has carried a suit to the Supreme Court, is still seeking a civil judgment."

Thereafter, the plaintiff, Frank Pape, filed this action against Time, Inc., founded on libel, alleging that the aforesaid Time article was false in that it reported the Commission *said* Pape had done the aforesaid things, when in fact, the Commission was only reporting allegations of complaint. Time, Inc. filed a motion to strike the complaint, which motion was granted by the District Court. On April 25, 1963, in the case of *Frank Pape* v. *Time, Inc.* (1963, C.A. 7th, Ill.), 318 F. 2d, 652, the Circuit Court of Appeals rendered its decision reversing the District Court. The Circuit Court of Appeals there held that "Time took the risk when it re-worded parts of the Commission's Report that it might go too far", and further held that a jury could find that Time went beyond the limits of fairness and in so doing was not protected by its privilege of fair comment. The Circuit Court of Appeals further found in that decision that "a jury could read the Time article as stating that the report said Pape and his fellow officers *did* what the Commission Report merely said the Monroe complaint *alleged they did.* (Emphasis supplied)

Thereafter, this Court, in the case of *New York Times* v. *Sullivan*, 376 U.S. 254, rendered its decision holding that in a libel action by a public official there must be a showing that the false statement was made with malice; that is, knowledge of its falsity or reckless disregard of whether it is true or false.

On remandment of this case an answer was filed by Time, Inc. The deposition of Pape was taken and the District Court granted a motion for summary judgment, relying on the case of *New York Times* v. *Sullivan (supra)*. A second time the case was appealed to the Circuit Court of Appeals. On the second appeal in *Frank Pape* v. *Time, Inc.* (1965 C.A. 7th Illinois), 354 F.2d 558, the Circuit Court of Appeals held the defendant, Pape, a public official within the meaning of the *New York Times* v. *Sullivan (supra)* and considered whether or not the record before it on motion for summary judgment revealed facts sufficient to show that the statement made by Time, Inc. was made with "actual malice"—that is, with knowledge that it was false or reckless disregard for whether it was false or not. In this regard the Court said:

> "We must now determine whether there is sufficient showing in the record before us that Time's statements were knowingly false or made with reckless disregard as to whether or not such statements were false.
>
> "As stated in our previous decision '. . . Time took the risk when it re-worded parts of the Commission's Report that it might go too far. . . . .' We noted Time had departed from fidelity to the Commission's Report in order to make the article more interesting and readable for its audience. Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit. As we put it (318 F.2d, at page 655), 'it is our opinion that a jury could read the Time article as stating that the Report *said* Pape and his follow (sic) officers did what the Commission Report merely said the Monroe complaint alleged they did.'

> "We hold that a sufficient showing has been made so that a jury could find Time, Inc. acted with reckless disregard as to whether or not re-worded statements hereinbefore described were true or false. Therefore, it was error for the District Court to grant defendant's motion for summary judgment."

Certiorari was denied this decision by the Supreme Court in 384 U.S. 909.

On the second remandment of this cause the parties entered into a stipulation of fact and a pre-trial order was entered and the matter proceeded to trial. Eight eye-witnesses were produced, including plaintiff, Pape, each of whom testified as to the incident set forth in the Commission's Report and the Time article. Generally, each of these witnesses denied those acts set forth as facts in the Time article and in the complaint reported by the Commission. Pape's testimony was substantially the same as the deposition previously filed in support of the motion for summary judgment which had been reviewed by the Circuit Court of Appeals. In addition, on the trial of the cause there was presented the testimony of Edward F. Magnuson, the author of the Time article. Magnuson, a former police reporter for the Minneapolis Tribune, testified that he had three documents to which he referred when he wrote the Time article. These documents consisted of the Commission's Report, heretofore set forth (App. 374), a news release from the Commission, Exhibit G, which in no way mentioned the plaintiff, Pape (App. 220), and a New York Times story, Exhibit H, which in no way mentioned plaintiff Pape (App. 220). Magnuson also testified that in addition to the aforesaid, the only other investigation he made was a telegram to Chicago to determine whether or not Pape had been punished

(App. 221). As far as writing the article was concerned, Magnuson testified as follows (App. 219-220):

> Q. Would you describe, sir, what deletions you made between the matter you read in the government publication and the matter which you read in the Time article?
>
> A. Well, we have deleted only in the quotable parts here, the section of that paragraph which is within quotes. The only changes in that section have been to change the word "that" in the *Justice* document to "the" in order to break up this long, long sentence. We have changed the semicolon to periods, again in the interests of clarity. Then we did not continue the whole quote, which goes on to what happened after Monroe was arrested and brought to the police station.
>
> Q. You also, sir, omitted that part of the article that is in *Justice* which reads, 'On the basis of a complaint which alleged that . . .'
>
> A. That's right.

Magnuson further testified that he knew he was reporting as a fact what the Commission only reported as allegations in a complaint. Magnuson testified as follows (App. 253-255):

> "Q. . . . I will read it for you. I am reading after the words 'Searches, seizures, violence, Chicago' "The Supreme Court of the United States decided the case of Monroe vs. Pape on February 20, 1961. Although this decision did not finally dispose of the case, it did permit the Plaintiff to sue several Chicago police officers for violation of the Federal Civil Rights Act on the basis of a complaint which alleged that", you did read that?
>
> A. I certainly did, right.
>
> Q. You understood the word 'complaint'.
>
> A. That's right.

Q. You understand the word 'allege'?

A. That is right.

Q. Therefore, while you did not find the word 'allege' in the running head, 'Searches, seizure and violence, Chicago, 1958', you did find it in the body, is that right?

A. I did, sir, right.

Q. You found the word 'complaint'?

A. That's right . . . .

Q. Well, I will read it again, sir, it says '. . . on the basis of a complaint which alleged' . . . Mr. Reuben asked you a moment ago to tell us what you thought, so suppose you now tell me what you think. What did you think when you read, '. . . on the basis of a complaint which alleged . . .? Tell us what that means to you.

A. That means to me the Commission in this case is reporting this incident in terms of a claim being made in a Court by the Monroes, but you can't stop there . . . .

Q. There is more here than just an allegation or a complaint.

A. In the context of this report there is more than just an allegation involved here, that is right.

Q. You did not understand this as simply the complaint of James Monroe as filed in a court suit.

A. I knew they were citing the complaint of James Monroe.

Q. However, you understood that there was more to it than just that.

A. That is right."

Mr. Magnuson admitted that by the Time article he was not trying to say the Commission was reporting allegations of a complaint. Magnuson further testified that changes which he made in his article from the Commission Report did not make it clear to the reader that these were allegations of a complaint (App. 261.) He

further testified that by his article concerning Pape he was talking about findings of the Commission (App. 261).

Testimony was also presented on the trial of this cause by one Karen Booth, editorial researcher for Time Magazine, who was the researcher on the Time article which is the subject matter of this action. She stated that as a part of this job she read the Commission Report and checked the Time story against the Commission Report (App. 267). She further testified that she called for the "morgue" file of Time, Inc. concerning the Monroe-Pape incident (App. 267). In checking the article against the Commission Report she found that although Magnuson's quotation from the Report was accurate, it was not complete (App. 270). Reference to the complaint and allegations had been left out. She further testified she did not believe it was her function as a researcher to call this fact to the attention of the writer (App. 270). She believed it was the prerogative of the writer to choose what portion of a particular quotation he desired to use (App. 271). She examined the "morgue" of Time but the only attempt to call this "morgue" to the author's attention was a conversation wherein Mrs. Booth told the author that there was quite a bit of material on Capt. Pape and the Monroe case in the library and that other newspapers had published reports of that incident (App. 251).

At the close of the plaintiff's case defendant moved for a directed verdict, which motion was denied. At the close of all the evidence the defendant again moved for a directed verdict, which motion was allowed.

Plaintiff thereupon appealed for the third time to the Circuit Court of Appeals. On such appeal in *Pape* v. *Time, Inc.*, 419 F.2d 980, the Circuit Court of Appeals

once again reversed the judgment of the District Court and remanded the cause.

In this opinion, after reviewing the various decisions of the United States Supreme Court, on what constitutes malice, the Circuit Court of Appeals said:

> "In our second opinion we stated, at 354 F.2d, 560, 'Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit.' Since that time the author of the Time article, one Edward F. Magnuson, has so testified. He admits that when he wrote the article he knew the Commission's Report stated that the alleged assaults on Monroe and his family were based upon a complaint which made such allegations. Magnuson was a former police reporter for the Minneapolis Tribune and he testified he knew the meaning of the word 'complaint' and of the word 'alleged.' However, Magnuson deliberately and knowingly failed to mention in his article that his story of the alleged conduct and the action of Pape and the other police officers was based on allegation in a complaint in a pending suit.
>
> "We are here concerned with Time's falsification of what the Report said rather than the falsification of a story about the Monroe incident. Surely, a deliberate act of omission can show malice as well as an act of commission. Time omitted mention of the fact that when the article was written the Pape-Monroe incident was reported in *Justice* as allegations in a complaint, not as proven fact, and the alleged injury to Pape was in Time's stating that the Commission reported the incident as true instead of stating that the Commission reported it as alleged to be true. The jury could conclude that this amounted to an 'intent to inflict harm through falsehood.' (Citations)

> "We think pertinent the recent statements of the Court of Appeals for the Second Circuit in *Goldwater* v. *Ginsberg,* 414 F. 2d 32, 327 (2nd Cir. 1969): 'One cannot fairly argue his good faith or avoid liability by claiming that he is relying on the reports of another if the latter's statements or observations are altered or taken out of context.'"

In a concurring opinion Judge Kiley of the Circuit Court of Appeals stated:

> "It is my view that the testimony of Magnuson referred to in Judge Duffy's opinion was sufficient *prima facie* to prove that Time published the article in suit with knowledge that it was false.' The publication of the article with the words in the Commission Report deliberately omitted could reasonably be found to be a publication of 'a defamatory falsehood . . . with knowledge that it was false.' This met the test of *New York Times Co.* v. *Sullivan,* 376 U.S. 254, (1964), under which either knowledge of falsity or reckless disregard of whether the material is false or not is required for proof of the vital element of 'malice' . . . ."

This is a petition to the United States Supreme Court to review this third decision of the Circuit Court of Appeals for the Seventh Circuit.

ARGUMENT

REASONS FOR DENYING THE WRIT

Under the Constitution of the United States there is a right of privacy. There is freedom of speech and press. There is a right to trial by jury in libel actions. The Court of Appeals for the Seventh Circuit, in the instant case, following *New York Times* v. *Sullivan*, and its progeny, maintained the delicate balance between free expression and the right of a man to the protection of his own reputation from unjust invasion and wrongful hurt. The Court of Appeals for the Seventh Circuit is not in conflict with any decisions of this Court or other Courts in defining and applying the New York Times actual malice test.

The Court below could not subscribe to Time, Inc.'s contention that a showing of malice can be defeated only by its protestation of good faith. In so doing it followed this Court's pronouncement in *St. Amant* v. *Thompson*, 390 U.S. 727, at page 732, where it is said:

> "The defendant in a defamation action by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or based wholly on a non-verified annonymous telephone call."

Protestations of good faith are meaningless where, as Time, Inc. admitted here, it knowingly and intentionally

transformed a report of a high governmental official of allegations in a complaint into findings of fact of such Commission. Therein lies the lie, and Time, Inc. knew it was lying. *New York Times* v. *Sullivan* defines "actual malice" as with knowledge that a statement was false or with reckless disregard of whether it was false or not.

Under the facts of this case, for the Circuit Court of Appeals to have held otherwise would have been a denial of this Court's holding that malice may be proved by a showing of knowing falsity, and would mean that there was no protection to the individual of his reputation from unjust invasion and wrongful hurt.

In its petition before this Court Time, Inc. laments the chilling effect that jury verdicts might have on freedom of press and speach, and would translate such concern into a denial of the right to a jury trial. By its petition to this Court Time, Inc. not only fails to recognize that the decision of the Court of Appeals below was in accord with the pronouncements of this Court and other Circuits, but also fails to recognize the present procedure position of this case. The District Court decided this matter on a motion for directed verdict. Under such circumstances the directed verdict should have been denied if there was any evidence from which a fair-minded jury could find for the non-moving party. The abandonment by the District Court of this principle was tantamount to the denial of the right to trial by jury.

The Circuit Court of Appeals reversed and remanded. Therefore this matter comes to this Court without finality. Ordinarily this Court will not grant certiorari to review a non-final judgment, such as one remanding a case to the District Court for a new trial.

This case involves the first amendment. It may be the most important provision of the United States Constitution. Freedom of press is important. The right of privacy is important. This does not mean to say that every case falling within these categories is of such importance as to clog this Court's busy schedule. It involves the attempt of a simple police officer of the Chicago Police Department to protect an unsullied reputation after many years of service. It involves an incident nine years old, not a part of current civil rights activities in the City of Chicago. Certainly, this case, although concerned with somewhat similar issues, is not as important as the case of *Goldwater* v. *Ginsberg*, 414 F. 2d, 324, wherein this Court denied certiorari in 396 U.S. 1049.

The principles of law and the rules of this Court favor the denial of certiorari by this Court and require that the Seventh Circuit's holding stand.

THE SEVENTH CIRCUIT'S HOLDING IS IN HARMONY WITH THE DECISIONS OF THIS COURT AND ALL OTHER CIRCUITS.

A. HARMONY WITH THIS COURT'S DECISIONS.

There can be no argument that the Court below subscribed to and recognize the principles set down by this Court in *New York Times* v. *Sullivan*, 376 U.S. 254. The Court below stated:

> ". . . we recognize the doctrine 'that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not . . . .'"

Time, Inc. only argues here what constitutes malice sufficient to permit a case to go to the jury.

New York Times v. *Sullivan* was an action for libel brought by the Commissioner of Public Affairs of the City of Montgomery, Alabama, against the New York Times because of a paid advertisement appearing in its newspaper over the signature of sixty-four persons widely known for their activities in public affairs, which advertisement stated:

> "In Montgomery, Alabama, after students sang 'My Country 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school and truck loads of police, armed with shot guns and tear gas, ringed the Alabama State College campus. When the entire student body protested to State College authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission. . . .
>
> "Again and again the Southern violators have answered Dr. King's peaceful protest with intimidation and violence. They have bombed his home, almost killing his wife and child; they have arrested him seven times for speeding, loitering and similar offenses, and now they have charged him with perjury, a felony under which they could imprison him for ten years . . . ."

The plaintiff in the *New York Times* case equated the various charges in the advertisement aforesaid to himself because he was the city official in charge of police.

After enunciating the rule that malice is required in an action for libel by a public official, this Court, in the *New York Times* case, examined the record to determine whether malice existed. This Court found malice lacking because:

> 1. This Court found the matters set forth in the advertisement substantially true and any admission

by New York Times officers of minor discrepancies were after the fact and had no relevancy to the time of publication (p. 286).

2. The mere presence of contrary stories in the files of the Times did not establish that the Times knew the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times organization having responsibility for the publication of the advertisement (page 287).

3. The New York Times was excused from an independent investigation since the Times had a right to rely upon the knowledge of the good reputation of the many persons listed as sponsors of the advertisement.

4. There was no reference to the plaintiff in the advertisement, either by name or official position, and many of the allegations by their terms did not even concern the police (page 288).

5. The advertisement constituted an attack on government and not on plaintiff (page 290).

The magazine article in the instant case was not an advertisement sponsored by persons well known in public affairs. It was not a general attack on government. It named the plaintiff, specifically charging him with heinous crimes in the course of his duties. Plaintiff was the only one in such article mentioned by name; others accused of wrongdoing were referred to at most by initials. The article said:

"The new paperback has 307 pages and the simple title, *Justice*. It is the last of five volumes in the

second Report of the Commission on Civil Rights, first created by Congress in 1957. *Justice* carries a chilling text of police brutality in both the South and the North and it stands as a grave indictment, since its facts were carefully investigated by field agents, and it was signed by all six of the noted educators who comprise the Commission . . . .

". . . The police, says *Justice*, "broke through two doors, woke the Monroe couple with flashlights, and forced them, at gunpoint, to leave their bed and stand naked in the living room. The officers roused the six Monroe children and herded them into the living room. Detective Frank Pape struck Mr. Monroe several times with his flashlight, calling him 'nigger' and 'black boy' . . . ."

This article is a far cry from a general attack on the police of the City of Chicago or an attack like that in the *New York Times* case on the police of Birmingham, Alabama.

In this article Time, Inc. said that a high-ranking Commission found plaintiff guilty of assault and battery, obscenities and police brutality. Time's employee who wrote this story admitted that he knew at the time of the writing the Commission was only setting forth allegations of a complaint. This knowledge existed at the time Time's story was written and was not, as in the *New York Times* case, an admission of minor discrepancies a substantial time after publication.

The only matters which the author had before him in writing the story was the Commission Report and two other publications which in no way mentioned the plaintiff. He knowingly chose to report as findings of fact what the Commission reported as allegations. He did so in spite of the fact that the Commission's Report is

couched in the most cautious terms. All instances in the Commission's Report, except the Pape incident, employed initials. The Commission specifically stated "in no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements." The Commission introduced its chapter as follows:

> "In the text of this chapter the Commission briefly describes the alleged facts in eleven typical cases of police brutality."

Time can take no pride in its so-called methodology of searching its morgue. Here, as in *New York Times*, the contents of the morgue were never brought to the author's attention. It should also be pointed out that anything in the morgue concerning the Commission Report did not mention Pape, and therefore could not justify the author in reporting that the Commission found Pape guilty of crimes when said Commission only reported allegations of a complaint.

New York Times v. *Sullivan* found malice wanting, among other reasons, because the mere presence of contrary stories in its files "does not, of course, establish that the Times knew the advertising was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times organization having responsibility for the publication of the advertisement." *A fortiori*, the *New York Times* case holds that if a contrary statement is brought home to the person in the publishing organization having responsibility for the publication and he chooses to ignore it, malice exists. Here, Time's author knew that he was dealing with allegations but chose to report them as findings of fact. There-

fore, the Court below in its opinion was only carrying out the principles of this Court in *New York Times* v. *Sullivan.*

Besides the author's publication of a known falsity, the record in this case indicates such a total want of verification when information was easily available, such unreasonableness of the libel statement, with its dire consequences to the plaintiff, as to constitute reckless disregard of whether it was false or not. Under such circumstances the decision of the Circuit Court of Appeals is in accord with this Court's holding in *St. Amant* v. *Thompson,* 390 U.S. 727 (1968) and *Curtis Publishing Co.* v. *Butts* and *Associated Press* v. *Walker,* 388 U.S. 130 (1967). In the *Butts* case the United States Supreme Court expanded the *New York Times* rule to "public figures" but upheld the jury verdict on the ground that malice had been shown. The Court, at page 1991 equated malice to "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers. On pages 1992 and 1993 the Court states:

> "The evidence showed that the Butts story was in no sense hot news and the editors of the magazine recognized the need for a thorough investigation of the serious charges. Elementary precautions were nevertheless ignored. The Saturday Evening Post knew that Burnett had been placed on probation in connection with bad check charges but proceeded to publish the story on the basis of his affidavit without substantial independent support. Burnett's notes were not even viewed by any of the magazine's personnel prior to publication. John Carmichael, who was supposed to have been with Burnett when the phone call was overheard, was not interviewed. No attempt was made to screen the films of the game

to see if Burnett's information was accurate and no attempt was made, to find out whether Alabama had adjusted its plans after the alleged divulgence of the information.

"The Post writer assigned to the story was not a football expert and no attempt was made to check the story with someone knowledgeable in the sport. At trial such experts indicated that the information in the Burnett notes was either such that it would be evident to any opposing coach from the game films regularly exchanged or valueless. Those assisting the Post writer in his investigation were already deeply involved in another libel action based on a different article brought against Curtis Publishing Co. by the Alabama coach and unlikely to be the source of a complete and objective investigation. The Saturday Evening Post was anxious to change its image by instituting a policy of 'sophisticated muckraking' and the pressure to produce successful expose' might have induced a stretching of standards. In short, the evidence is ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

Finally, at page 2994, the Court states:

"Publishers, like Curtis, engage in a wide variety of activities which may lead to tort suits where punitive damages are a possibility. To exempt a publisher because of the nature of his calling from an imposition generally exacted from other members of the community would be to extend a protection not required by the constitutional guarantee. . . ."

". . . Where a publisher's departure from standards of press responsibility is severe enough to strip from him the constitutional protection our decision

acknowledges, we think it entirely proper for the state to act not only for the protection of the individual injured but to safeguard all those similarly situated against like abuse."

The case of *St. Amant* v. *Thompson* involved a defendant who was a candidate for public office. In the course of a television speech the defendant read a series of questions which he had put to a member of the Teamsters Union and said member's answers to those questions. The exchange concerned the alleged nefarious activities of the President of the Union. The plaintiff was an East Baton Rouge Parish deputy sheriff and in the course of the questions and answers the deefndant read an answer of the Union member that money had passed between the Union President and the plaintiff. This Court overturned a jury verdict for the plaintiff, holding that there was insufficient showing of reckless disregard. In so doing the Court was persuaded by the fact that the defendant had verified other aspects of this Union member's information and had affidavits from others, and that the Union member had sworn in writing to his answers which were read, and the Union member in making such answers was placing himself in personal danger. Under such circumstances the Court felt the defendant had a right to rely upon his limited investigation.

In the instant case Time Magazine made no independent investigation, although it, like Curtis Publishing Company in the *Butts* case, was not dealing with hot news. Time, Inc. cannot contend that it relied upon the investigation of the Commission staff, since such investigation only produced the fact that a complaint had been filed, with certain allegations. No one at Time, Inc. made any attempt to contact anyone who was involved in the Monroe in-

cident. Time, Inc., unlike the defendants in the *Butts* and *St. Amant* cases, had no affidavits from any sources. It is true that a Time researcher did go to the Time morgue and found certain newspaper clippings. The researcher, however, in no way called the various stories constituting the Time morgue file to the attention of the writer. Therefore, the contents of such morgue stories in no way influenced the contents of the article. In any case, such stories constituted no more than hearsay newspaper and magazine clippings, the authenticity of which were not checked. Similar research was condemned in *Spahn* v. *Julian Messner, Inc.*, (1967) 233 N.E. 2d 840, at pages 843.

The finding of the Court below which held that a sufficient showing of malice had been made to permit the case to go to the jury is also in accord with this Court's holdings in the cases of *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), and *Henry* v. *Collins*, 380 U.S. 356 (1965), and the Court below carefully considered each of these decisions.

In addition, the decision of the Court below is in accord with this Court's decision in the case of *Gunning* v. *Cooley*, 281 U.S. 90, wherein, at page 94, the rules governing courts on motions for directed verdict are set down as follows:

> "A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' (Citations)

"Issues that depend on credibility of witnesses, and the effect or weight of the evidence are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such fact there should be drawn in favor of the latter all the inferences that fairly are deducible from them (Citations). Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. (Citations)."

We respectfully submit that certiorari should be denied because the Circuit Court of Appeals for the Seventh Circuit followed and properly applied the principles enunciated by this Court in *New York Times* v. *Sullivan* and its progeny.

B. HARMONY WITH OTHER CIRCUITS.

The Seventh Circuit's decision is in accord with the holdings of Courts of other Circuits, of District Courts and the Supreme Courts of the various states.

Recently the Circuit Court of Appeals for the Second Circuit rendered its decision in the case of *Goldwater* v. *Ginsberg,* 414 F.2d 324 (1969). This case was concerned with an article in "Fact" Magazine, which article alleged that Senator Barry Goldwater was psychologically unfit to be President. There, like here, the defendant sought to escape malice by contending that he relied on other sources in setting forth his story. The Court upheld a denial of motion for summary judgment and of a motion for directed verdict and jury verdict. At pages 337 the Court said:

"Citation of sources for most of the statements about Senator Goldwater in Part I of the 'Goldwater issue' and the accurate reprinting in Part II of most of the original responses of psychiatrists to the Fact questionaire, does not, as appellants appear to claim, insulate appellants from responsibility for any of the false statements they made. Reliance upon newspaper articles, books and campaign literature and upon accurate reprinting of another's letter are only factors which, with other factors, are probative of whether the publisher of the cumulated material was motivated by actual malice when he caused the full material to be published. Repetition of another's words does not release one of the responsibility if the repeater knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted or the accuracy of his report. (Citations) Furthermore, in our case, Ginsberg added certain innuendoes to some quoted statements and quoted other statements out of context in order to support his predetermined result. One cannot fairly argue his good faith or avoid liability by claiming that he is relying on the report of another if the latter's statements or observations are altered or taken out of context. Also, if Ginsberg's 'melding' and 'distillation' of letters results in misplaced emphasis or exaggeration, or distortion, he cannot reasonably maintain that the misstatements contained in the new product he thereby created are not his misstatements.

"Viewing the submitted material and the inferences which might be drawn from them 'in the light most favorable to the party opposing the motion' (Citations), the district court properly concluded that a trier of fact should have the opportunity to decide whether appellants were liable to appellee"

In the instant case defendant, Time, Inc., like the defendant Ginsberg, argues its good faith and seeks to avoid liability by claiming that it was relying on the Commis-

sion's Report. But Time and Ginsberg altered the reports and exaggerated and distorted what was said. Under such circumstances the Court below, as well as the Second Circuit, in *Goldwater* v. *Ginsberg,* (supra), held that the defendant cannot reasonably maintain that the misstatements contained in the new product thereby created are not the misstatements of the defendant.

So also, in the case of *Varnish* v. *Best Medium Publishing Company,* 405 F.2d 608 (1968), the Court was confronted with protestations of good faith by the author. This involved the reporting of a murder and the suicide of the plaintiff's wife. Plaintiff attacks the article because it employed a "happy wife and mother" theme, which was false. There was a suicide note available to the author when the story was written which said (p. 611):

> "Just a note and explanation to let you know that I am going to put the three children and myself to sleep forever. I see no future for the children or myself. Mitch (plaintiff) is impossible and this is the only way to get away from him. I've had a miserable life since the time I met him. Tell Uncle Chris and Uncle Butch I'm sorry about the money they each loaned me in 1961 . . . I owe so much I'll never have to bother anyone anymore."

In his article the author said:

> ". . . Police found a note left by Mrs. Varnish for her mother, which said: 'Just a note in explanation to let you know know I am going to put the three children and myself to sleep forever. I can't go on.' It was an explanation that explained nothing, least of all to the shocked Varnish."

The Court on review required malice and upheld the jury verdict. At page 612 the Court said:

> "Evidence of recklessness consists largely of the author's testimony on cross-examination that he had no basis except his own 'presumption', for labeling Mrs. Varnish a happy wife and mother. Both the suicide note and the police report which the author had in his possession indicated that the Varnishes did not have a happy home life. Likewise, the manner in which the suicide note was used by the author could be taken as evidence of intent or recklessness. Therefore, the jury was entitled to find that the article was published with the knowledge that it was false or in reckless disregard of the truth."

Certainly, the fact that a story was based on a written report from which information was inaccurately reported, strongly suggests the existence of actual knowledge. If a publisher alters or changes true facts so that the article as published becomes a fictionalized version, the least that can be said is that such action constitutes knowing or reckless falsity. Alteration or change denotes a positive act, not a negligent or inadvertent happening. Time was reporting what the Commission said. It knew that the Commission's report set forth allegations in a complaint. It intentionally and knowingly altered and changed this report of allegations into findings of fact, so that Time's article as published was a fictionalized version, a creation of its own. This was a positive act, not a negligent or inadvertent happening.

Throughout this appeal Time professes its good faith by stating that the author and the researcher believed that what they wrote was true. It is not clear, however, just what their protestations of true belief applied to. They admit that their story did not truly portray he Commission's Report, since the Commission reported only allegations. If they believed that they were truly reporting the Monroe incident, they entered upon it with absolutely no investigation of any kind to justify their accusations.

Nor is it true, as Time would have this Court believe, that the decision of the Seventh Circuit below is in conflict with the case of *New York Times Company* v. *Connor*, 365 F.2d 567 (Fifth Circuit 1966). In finding malice wanting the Court in the *Connor* case particularly excluded a situation such as is presented here. At page 577 the Court said:

> ". . . Although one might disagree with the conclusions, he (author) drew from his information or his emphasis on certain facts rather than others, there is no evidence that he misquoted his sources or gave the information acquired from them a different slant than intended as is so often done."

A case particularly similar to the instant case is the recent District Court decision in *Ragano* v. *Time, Inc.*, 302 F.Supp. 1005 (1969). In that case Time referred to an attorney as a member of the Cosa Nostra, knowing such individual was an attorney. The Court very succinctly stated the distinction which Time fails to make in the instant case. At page 1010 the Court said:

> ". . . The present case differs, however, because Time had actual knowledge of the fact that the plaintiff was an attorney but decided to disregard or omit this fact. The first amendment does not require that the plaintiff show knowledge of falsity and then, as Time contends, bad faith in the publisher's choice of disregarding the truth. When the plaintiff presents evidence to show that the publisher chose to substitute his opinion for facts actually known by him in an article that is capable of a defamatory meaning, he has come forward with sufficient evidence to show reckless disregard."

We submit the Seventh Circuit's decision is also in accord with *Hogan* v. *New York Times*, 313 F.2d 354 (1963); *Ashton* v. *Commonwealth*, 405 S.W.2d 562 (Supreme Court

of Kentucky 1965); *Gilligan* v. *King*, 264 N.Y.S.2d, 309, 48 Misc. 2d 212 (1965); *Tucker* v. *Kilgore*, 388 S.W.2d 112 (Supreme Court of Kentucky 1965); *Mahnke* v. *Northwest Publications, Inc.*, 280 Minn. 328; 160 N.W.2d 1 (Supreme Court of Minn. 1968).

THE DECISION BELOW LACKS FINALITY

By its decision the Circuit Court of Appeals for the Seventh Circuit reversed this cause and remanded it for a new trial. Therefore, there is a lack of finality in the decision of the Circuit Court of Appeals.

In the text book "*Supreme Court Practice*, Stern-Gressman, Third Edition, 1962, "Section 4-19, at page 148, it is said:

> "The Supreme Court will not usually grant certiorari to review a non-final judgment such as one remanding the case to the District Court for a new trial or one sanctioning the issuance or denial of preliminary injunction in the absence of some exceptional reason."

This Court enunciated the aforesaid principle in the case of *Hamilton Shoe Co.* v. *Wolf*, 240 U.S. 251, at page 258, where it said:

> ". . . Appeals for certiorari under Section 240, Jud. Code, derived from Section 6 of the Evarts Act of March 3, 1891, 26 Stat., 826, 828, Ch. 517. As has been many times declared, this is a jurisdiction to be exercised sparingly and only in cases of peculiar gravity and general importance or in order to secure uniformity of decisions (Citations), and except in extraordinary cases the writ is not issued until final decree (Citations). The decree that was sought to be reviewed by certiorari at complainant's insistence was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application . . . ."

The reason for this rule is to discourage piece-meal disposition of appeals. It is also an attempt to avoid the obstruction to just claims that would come from permitting the harrassment and cost of a succession of separate appeals from the various rulings. To be effective, judicial administration by this Court must not be clogged. Appeal to this Court is not a matter of right and this Court certainly, except in rare instances, should not be called upon to pass on litigation which is not final.

This court always after remandment and new trial has the opportunity to consider litigation. It should also be pointed out that this case is before the Court on a motion for directed verdict, which motion does not permit the weighing of evidence but under the usual rules only permits a determination of whether there is any evidence from which a fair-minded jury might find for the non-moving party.

Time would have this Court abandon its long-honored principle of requiring certiorari only in instances on final judgments because of the so-called chilling effect of jury verdicts. So also, Time called upon the District Court to abandon the time-honored principle of viewing the evidence, on a motion for directed verdict, in the light most favorable to the plaintiff, because of its so-called chilling effect.

Nothing in *New York Times* v. *Sullivan*, or any cases thereafter requires the abandonment of trial by jury in libel actions. It is admitted that in all libel actions a plaintiff must show malice. It is admitted that on the trial of the cause the Court must properly instruct the jury as to what constitutes malice. It is denied, however, that juries in Chicago or anywhere else in the United States are at all deficient as a trier of fact. To so contend is a plea in

the special instance of libel for the abandonment of the jury system.

CONCLUSION

For the reasons set forth above we submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

PATRICK W. DUNNE
ROBERT J. NOLAN
EDWARD J. HLADIS
NOLAN, O'MALLEY & DUNNE
33 North Dearborn Street
Chicago, Illinois 60602
346-5445
Attorneys for the Respondent.

Dated: April 6, 1970